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No. 274

In the Supreme Court of the United States

OCTOBER TERM, 1960

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

WHITAKER HOUSE COOPERATIVE, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The opinion of the District Court (R. 196–216) is reported at 170 F. Supp. 743. The opinions in the Court of Appeals (R. 217–225) are reported at 275 F. 2d 362.

JURISDICTION

The judgment of the Court of Appeals was entered on March 2, 1960 (R. 225). By orders of Mr. Justice Frankfurter, dated May 27, 1960 (R. 226) and June 29, 1960 (R. 227), the time for filing a petition for a writ of certiorari was extended to and including July 30, 1960. Certiorari was granted on October 12, 1960

(364 U.S. 861, R. 227). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

1. Whether the relationship between the "member-producer" homeworkers and the respondent cooperative and its managing officials is an employment relationship subject to the Act, or whether such a cooperative organization, if considered "bona fide," effectively converts the homeworkers into independent self-employed individuals so that the Act and its regulations restricting homework can be lawfully avoided.

2. Whether the respondent cooperative is a bona fide member-controlled cooperative organization.

STATUTE AND REGULATIONS INVOLVED

Pertinent provisions of the Fair Labor Standards Act of 1938, as amended (c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910, c. 867, 69 Stat. 711, 29 U.S.C. 201 *et seq.*) and the Regulations issued pursuant thereto are set forth in the Appendix, *infra*, pp. 59–67. The statutory provisions particularly involved are Sections 3(a), (d), (e), and (g) and Section 11(d), which read as follows:

> SEC. 3. As used in this Act—
>
> (a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.
>
> * * * * *
>
> (d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not

include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

* * * * *

(g) "Employ" includes to suffer or permit to work.

* * * * *

SEC. 11.

* * * * *

(d) The Administrator is authorized to make such regulations and orders regulating, restricting, or prohibiting industrial homework as are necessary or appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in this Act, and all existing regulations or orders of the Administrator relating to industrial homework are hereby continued in full force and effect.

STATEMENT

This action was filed under Section 17 of the Fair Labor Standards Act to enjoin Whitaker House Cooperative, Inc., and respondents Whitaker and Bird, from violating the minimum wage, record-keeping, and shipping provisions of the Act (Sections 6, 11(c) and 15(a)(1)), and from failing to obtain special homeworker certificates for the women who make, in their homes, the goods in which the Cooperative deals—as required by the Wage Order for the Knitted Outerwear Industry, issued pursuant to old Section 8(f)

of the Act and Section 11(c), which order was continued in full force and effect by Section 11(d), added to the Act in 1949 (App., *infra*, pp. 60–63).[1]

At a pre-trial conference, respondents conceded noncompliance with the Act's requirements in the respects charged in the complaint, as well as petitioner's right to an injunction against each of them, if the homeworkers involved in this action are "employees" within the Act (R. 197). At the beginning of the trial, respondents further conceded that if the workers in question are "employees," "it would necessarily follow that they are industrial homeworkers within the meaning of the Act and [the pertinent] regulations" (R. 27).

1. The Cooperative is primarily engaged in the production, sale, and distribution of articles of infants' knitwear, but it has recently added toys and women's capes and stoles to its line of merchandise (R. 106–107). All of these goods are made by homeworkers. The finishing work (trimming and packaging) is done by admitted employees of the Cooperative. Respondent Whitaker, the Cooperative's general manager, first entered the infants' knitwear business about 25 years ago (R. 198). In the beginning, she furnished the

[1] As originally filed, the complaint alleged similar violations on the part of Mrs. Whitaker during the period prior to July 17, 1957, when she operated the business in her own name (*i.e.*, before transferring it to Whitaker House Cooperative, Inc.) (R. 4). Later, however, by stipulation of the parties, the complaint was dismissed as to the violations during this earlier period (R. 197). The complaint was also dismissed against Mrs. Whitaker in her capacity as treasurer of Whitaker House Cooperative, Inc., it appearing that she had resigned from this position on October 10, 1957 (R. 205).

yarn out of which the homeworkers made the booties, caps and sacques, but some years ago, when she ceased operations for a while, she transferred her yarn business to a neighbor, Mrs. Pearl L. Nutter—the same Mrs. Nutter who was later enjoined by the trial court below (also Gignoux, D.J.) from violating the Act in the employment of homeworkers (R. 198, 199). See *Mitchell* v. *Nutter,* 161 F. Supp. 799 (D. Me.).

During the early years of her operations, Mrs. Whitaker disposed of her goods through various out-of-state concerns, including the Edward S. Wagner Company which also employed homeworkers and was subsequently enjoined from doing so (R. 198).[2] After she resumed operations about five years ago (*ibid.*), Mrs. Whitaker began selling some of her goods to or through Mrs. Doris Law (R. 62, 75) who operated a similar business in Tennessee until she was enjoined from employing homeworkers in violation of the Act, in June 1957 (R. 206).[3]

During the period immediately prior to the formation of the Cooperative, Mrs. Whitaker had approximately 163 homeworkers (R. 198–199), who knitted or crocheted articles of infants' wear for her in their homes. At her own home in Troy, Maine, Mrs. Whitaker employed a helper to trim the garments and to assemble them in sets (*ibid.*). She did not furnish the yarn during this period, and the homeworkers ob-

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[2] See *McComb* v. *Edward S. Wagner Co.,* 89 F. Supp. 304 (E.D.N.Y., 1950), reversed on other grounds, *sub nom. Tobin* v. *Edward S. Wagner Co.,* 187 F. 2d 977 (C.A. 2), and *Mitchell* v. *Edward S. Wagner Co.,* 217 F. 2d 303 (C.A. 2), certiorari denied, 348 U.S. 964. See also *infra,* pp. 36–37.

[3] See *Mitchell* v. *Law,* 161 F. Supp. 795 (W.D. Tenn.).

tained it from a Mrs. Fannie Johnson, of Unity, Maine (R. 37), who later joined the Cooperative (R. 20, 120). Mrs. Whitaker, however, set the price which she would pay for the garments on a piece-rate basis (R. 199). In addition, she would show the women "samples of the sort of things" she wanted (R. 24), and tell them the designs and colors to use (R. 33). If their work was unsatisfactory, she would reject it (R. 34) and tell them how it could be improved, and the homeworkers followed her instructions to the extent that they were capable (R. 36). As the trial court expressly found, "the relationship between Mrs. Whitaker and these homeworkers was substantially identical to that between Mrs. Nutter and her homeworkers, which this Court described at length, and held to be an employment relationship within the Fair Labor Standards Act, in *Mitchell* v. *Nutter*, 161 F. Supp. 799 (D. Me.). There can be no question that if Mrs. Whitaker were presently operating as previously, her operations would fall within the scope of *Nutter*, and an injunction should issue" (R. 199). The Wage and Hour Division of the Department of Labor had formally so advised Mrs. Whitaker in January, 1957 (R.199), and it was following this advice that respondent Whitaker House Cooperative, Inc., was formed.

2. It is not disputed, and the trial court found, that Mrs. Whitaker and her attorney, respondent Bird, "actively participated in the organization of the Cooperative for the express purpose of attempting to avoid application of the Fair Labor Standards Act to the homeworkers here involved" (R. 209).

Formation of the Cooperative was begun by calling a meeting of "all the homeworkers who are interested in establishing a cooperative" (R. 192, 200). This was done by a form letter prepared by Mrs. Whitaker's attorney (R. 190–192). The letter assured the homeworkers that a cooperative "would enable them to comply with the Federal Laws concerning wage and hour regulations" (R. 191). It further stated that a cooperative would not only enable the workers to continue to make products in their homes, but would also "increase the uniformity of [the] products" and benefit the workers by "enabl[ing] them to purchase supplies at wholesale prices" (*ibid.*).

The organizational meeting was held in Waterville, Maine, on July 9, 1957 (R. 200–201). Mr. Bird presided and it was attended by Mrs. Whitaker and approximately 40 of the women who had made articles of infants' wear for Mrs. Whitaker (*ibid.*). Bird, Mrs. Whitaker, and 26 of the women present signed the original articles of association and approved the by-laws, which had been prepared in advance by Bird (R. 201). Two of the women had also worked for Mrs. Whitaker as trimmers (R. 202). These two trimmers and three of the homeworkers were made directors of the new enterprise (*ibid.*). Mrs. Whitaker's attorney (respondent Bird) became president; a cousin of her husband, John P. Kennedy, became vice-president (*ibid.*); and Mrs. Whitaker herself was made general manager (R. 46, 205), as well as secretary-treasurer (R. 202). The final formality of filing a copy of the Cooperative's Certificate of Organization with Maine's Secretary of State was

accomplished on July 18, 1957, whereupon Mrs. Whitaker ceased operating on her own, and transferred her business to the Cooperative "[l]ock, stock, and barrel" (R. 45, 48, 203).[4]

The by-laws state that the objective of the Cooperative is to promote the "economic welfare of members" (R. 151) and provide that "All persons, including married women and minors, firms and corporations shall be eligible for membership" (Art. 6, Sec. 1; R. 153). Homeworker-applicants for membership are required to buy from the Cooperative a sample "of the work that they are to do" (R. 138), to copy the sample, and then to submit the copy to the Cooperative (R. 162). If the work is found to be satisfactory, the applicant becomes a member upon purchasing a membership interest for $3.00 and agreeing to comply with the articles of incorporation and the by-laws (*ibid.*).

The by-laws, among other things, prohibit members from furnishing to other businesses knitted articles of the type dealt in by the Cooperative (Art. 13, Sec. 3; R. 161) and require that members remain such for at least a year (Art. 6, Sec. 6; R. 154). Members, however, may be "expelled" sooner for violation of any rules or regulations or if their work is substandard (which has been the reason assigned for "expelling" at least three members) (R. 174).

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[4] The Cooperative was chartered as a corporation under Maine's Consumer's Cooperative Act (R.S. Me., 1954, c. 56), but, as respondents have conceded, there is a serious question as to its legality since that Act contains no provision for the organization of a merchandising cooperative such as here involved (R. 210).

The financial interest of the members is meager. A membership interest costs only $3.00, and the by-laws specifically provide that "No member shall be liable for any debts or obligations of the Cooperative; nor shall any member be liable for any assessment" (Art. 4, Sec. 2; R. 152).

The members have little or no entrepreneurial skill,[5] and their participation in the control of the Cooperative is as slight as their financial interest. Two membership meetings have been held since the Cooperative was organized in July 1957, but neither meeting had a quorum which, under the by-laws, is 51 percent of the members (R. 154). At the special meeting held in October 1957, only 41 out of 172 members were present (R. 122–123). At the annual meeting held in June 1958 (R. 73), the Cooperative had 195 members, but only 37 attended the meeting (R. 69). Neither meeting was adjourned for lack of a quorum, as the by-laws provide (see Article 7, Section 5; R. 154–155), and at the June 1958 meeting the 37 members in attendance proceeded to "amend" the by-laws "so that 25 members constitute a quorum" (R. 182) and then "elected" officers and directors for the ensuing year (R. 182–183).

Under the by-laws, management of the Cooperative is vested in its Board of Directors and general man-

[5] The Cooperative's accountant made this clear when he stated that "after the Cooperative gained momentum [during the fall, the late fall], the members sent in material in tremendous quantities, not being aware—after all, they have no reason to be aware—that the big season for the Christmas merchandise * * *, is not just before Christmas but is back in August and September * * *" (R. 149).

ager (R. 204). The three most faithful members of the Board are Mrs. Leavitt and Mrs. Edmonds, both of whom had previously worked for respondent Mrs. Whitaker as trimmers (R. 202), and Mrs. Ella Banton (a former homeworker for Mrs. Whitaker) who now serves as the Treasurer (R. 135).[6] Between the monthly meetings of the Board, Mrs. Whitaker is in full charge of the Cooperative (R. 73). Although the by-laws provide that the manager is to run the business subject "to the direction, management and control of the Board of Directors" (R. 159), Mrs. Whitaker testified that she has "no particular way of knowing the actual contents of the records of the [Board's] meeting[s]" (R. 103); that she has never bothered to read through all the minutes (*ibid.*); and that she frequently leaves the meetings after giving her report on the affairs of the Cooperative (R. 206).

Except for changes necessitated by the new form of operating, the business is conducted in much the same way that it was conducted by Mrs. Whitaker prior to formation of the cooperative. Operations are still conducted from Mrs. Whitaker's home, and she, as general manager, still receives the articles sent in or delivered to her home by the workers (R. 205). The articles are still unfinished (R. 126) and must be trimmed and packaged (R. 55). The homeworkers are still paid on a piece-rate basis, the rates having been

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[6] Mrs. Banton was "appointed" Treasurer by the Board of Directors when Mrs. Whitaker resigned as such (R. 172), although the by-laws provide that officers shall be elected by the members (Art. 10, Sec. 1; R. 158).

established by "management with the consent of the Board of Directors" (Whitaker Cooperative's answer to plaintiff's Interrogatory No. 9; R. 9);[7] and the homeworkers are still told what to make, the colors desired, and the designs to be followed (R. 60). As Mrs. Whitaker explained, "we couldn't work any other way" (*ibid*).

As pointed out *supra*, pp. 5–6, when Mrs. Whitaker operated the business in her own name, the homeworkers bought their yarn from Mrs. Fannie Johnson of Unity, Maine. It appears that they still get yarn from Mrs. Johnson (R. 120), and that she, too, has joined the new enterprise (*ibid.*). Mrs. Doris Law, who used to deal with Mrs. Whitaker before her operations in Tennessee were enjoined (see *supra*, p. 5), has also joined the new enterprise. She is the Cooperative's "exclusive sales" agent (R. 206) and has been such almost from the beginning (R. 170).

Since the advent of Mrs. Law, the Cooperative has grown in membership. It now has some 200 members, many of whom live in Tennessee (R. 17–23).[8] It has also expanded its line of merchandise to include toys and women's capes and stoles (R. 106–107). Still further expansion is expected, if respondents should pre-

[7] The piece rates are now referred to as "advance allowance[s]" (R. 9). They are, however, definite amounts (see schedule of rates, R. 12–13), and the homeworkers expect to be, and are, in fact, paid on the basis of such rates (R. 125, 129, 130).

[8] The names of the Tennessee members are, in many instances, identical to those of Mrs. Law's homeworkers as set forth in *Mitchell* v. *Law*, *supra*, p. 5, fn. 3, or so similar as to suggest they are the same persons.

vail in this litigation;[9] and the by-laws and charter are broad enough to permit this. The by-laws do not limit membership to residents of the New England states or Tennessee, and the Cooperative now has members in eleven different states (R. 17–23). Nor does the Cooperative's charter restrict production to articles of infants' wear. On the contrary, as the trial court noted, the charter states that the purposes of the Cooperative "shall be, among others, 'to manufacture, sell and deal in knitted, crocheted, and embroidered goods of all kinds and in general to carry on a knitted wear business of making and selling knitted, crocheted, or embroidered clothing either at wholesale or retail'" (R. 203).

Despite the Cooperative's growth and expansion, it has not yet been a financial success. This is because its operating expenses, particularly the salaries fixed for respondents Whitaker and Bird and the 20 percent sales commission for Mrs. Law (the exclusive sales agent), are such that the Cooperative "could survive as a financially solvent enterprise only by doubling its present gross income" (R. 208). Even then the homeworkers would apparently still be receiving the same substandard rates that they are now being paid, with little or no hope of receiving any-

[9] While respondents' accountant was being questioned about the financial condition of the Cooperative and its prospects for the future, he said: "What is expected is that if fortunately for them the Cooperative and its officers should prevail in this action, they will be swamped with business. Many people, there is no question, are waiting to see how this comes out and who have said they won't send anything into the Cooperative until they know that the Cooperative is going on * * *" (R. 151).

thing additional by way of dividends. The Cooperative's accountant testified, "If the business were approximately doubled and ran shall we say from $85,000 to $90,000 gross sales, the ratio of commissions and payments to members would be unchanged" (R. 148). While he stated that the "remainder which would be left * * * would be sufficiently large so that something at [the Cooperative's then] general level of overhead could be carried" (*ibid.*), the Cooperative's outstanding debts would have to be paid before there would be any excess receipts for distribution to the members. As of September 4, 1958, the Cooperative was indebted to Mrs. Whitaker in the amount of $7,908 for back salary and inventory (R. 193). It was also behind in respondent Bird's salary to the extent of $1,200, and owed commissions to Mrs. Law in the amount of $2,550 (*ibid.*).

3. On this record, the trial court found that Whitaker House Cooperative, Inc., is a bona fide cooperative,[10] and held that it did not "suffer or permit" its producing-members to work, within the meaning of the Act (R. 209, 215). The basis of the holding is not entirely clear. At one point, the court expressed the view that "the members are engaged, through the Cooperative, in a joint venture" (R. 215), thus indicating that it may have considered the Cooperative

[10] While we believe this finding is clearly erroneous, we did not directly challenge it in the petition because we think, as Judge Aldrich did, that "the matter lies deeper than this" (R. 223). However, in our petition, we reserved the right to question the correctness of the finding that the Cooperative is a "bona fide" member-controlled organization, if certiorari was granted. See Point II, *infra*, pp. 46–57.

and its members to constitute a single entity. At another point, however, the court seems to have recognized that the Cooperative was a separate entity from its members. "It," said the trial court, "has no connection with their labors. Rather, they [the members], collectively, 'suffer or permit' themselves individually to work" (R. 215).

The Court of Appeals affirmed, with Judge Aldrich dissenting (R. 222–225), and with the two majority judges (Chief Judge Woodbury and Judge Hartigan) each writing a separate opinion (R. 217–222). In his opinion, Judge Hartigan expressed the view that the "members of the cooperative individually are the producers of the goods in which the cooperative deals" and agreed with the trial court's position that "[w]here the items produced by the members are the units used for measuring each member's share in the cooperative's net income," " '[t]heir interests as members and producers are identical' " (R. 221). In his concurring opinion, Chief Judge Woodbury referred to the Cooperative as a "bona fide organization" engaged simply in "the business of marketing such of the products of its producer-members as they may see fit to submit to it for sale"—*i.e.*, a mere "sales agency for its producer-members" (R. 222).

Judge Aldrich dissented on the ground that, not only are many of the homeworkers necessarily "inactive members" exercising no control over the Cooperative, and "differ[ing] in no respect from employees of any homework employer", but also that the Cooperative "constitutes an independent entity within the meaning of the Act, whether it be re-

garded as a corporation, or as an 'organized group of persons' " (Section 3(*d*), *supra,* p. 2), and that "[i]n the truest sense Cooperative 'suffer[s] or permit[s]' these ladies to work" (R. 223). "If," said Judge Aldrich, "the thought is that Cooperative is simply a selling organization * * * it is no more a sales organization than is any other employer of homeworkers whose amount of production is self-controlled (but who were restricted to selling to it)" (*ibid.*). The fact that members may exercise a voice or acquire stock in a corporate entity, Judge Aldrich pointed out, clearly does not preclude their being its employees, particularly "in terms of the philosophy of [this] Act," which is concerned not merely with the protection of particular workers who require its protection but also with fairness to "competing * * * other producers who must, perforce, respect the standards of the Act" (R. 224).

SUMMARY OF ARGUMENT

I

The homeworker-members of respondent Cooperative are employees (subject to the Fair Labor Standards Act) of the Cooperative or of its managers, whether or not the Cooperative is a bona fide member-controlled organization.

It is well-settled, as both courts below recognized, that "homeworkers generally are included in the statutory definition of 'employee' " of the Fair Labor Standards Act, and that the Act's application to them may not be circumvented by the particular legal labels attached by the parties to their relationship.

Walling v. *American Needlecrafts, Inc.*, 139 F. 2d 60, 64 (C.A. 6); see also *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722, 729, n. 8. The decision below mistakenly rests upon technical labels and concepts and isolated factors, to the exclusion of this Act's own broad definition of the persons and working relationships within its coverage. The application of such "comprehensive" statutory definitions is "not confined to * * * the technical and traditional concepts" or the contractual "labels" which the parties may attach to their relationship, but must be given a practical construction to include "workers who [are] such as a matter of economic reality," in the light of "the policy and purposes of the Act, the circumstances and background of particular employment relationships," and "the circumstances of the whole activity" rather than "isolated factors." (*United States* v. *Silk*, 331 U.S. 704, 713).

Judged by these well-settled criteria, every relevant consideration dictates the conclusion that the homeworkers here are respondent Cooperative's employees under this Act—if not, indeed, even under conventional standards of employment relationship. Among the most relevant—and, we submit, decisive—statutory and economic factors are the following:

A. The pre-1938 homework problems in the particular industries here involved exemplify the serious kind of substandard labor conditions and resultant unfair competition which the enactment of this Act aimed to correct. The two industries immediately concerned—knitted and crocheted infants' wear and women's knitted outerwear—were at that time fore-

most among those in which homework was prevalent and the wage and hour standards notoriously the lowest. The correction of the serious homeworker problem in these industries was one of the first tasks undertaken upon the passage of the Act because of an immediate large-scale plan to avoid the Act's application by a contractual arrangement designating the homeworkers as independent "manufacturers." This serious threat to the Act's enforcement, which was averted by the entry of a consent decree in November, 1939 (*i.e.* near the close of the first year of the Act's operation), has, throughout the ensuing 20 years, been kept under control by the consistent judicial condemnation of similar devices (prior to the decision in the instant case), bolstered by legislative confirmation of the administrative and judicial rulings.

B. The admitted facts in this record reveal the Cooperative to be a legal entity separate from its individual members, retaining in its managing officials a degree of control more than sufficient to qualify as the homeworkers' employer under this Act. The reasoning of the court below that the work performed by producer-members of the Cooperative is not performed as employment because " '[t]heir interests as members and producers are identical' " (R. 221), is inconsistent with this Court's decisions that a cooperative or corporation, deliberately organized as "an independent entity," is "a separate business organization" from its members, and that its independent status may not be disregarded in order to avoid statutory obligations imposed for the protection of the public. *Farmers Irrigation Co.* v. *McComb,* 337 U.S.

755, 768; *Boutell* v. *Walling*, 327 U.S. 463, 468, see also *Schenley Corp.* v. *United States*, 326 U.S. 432, 437. Even if the homeworkers had a true proprietary interest in the Cooperative and a real voice in its management, this would not preclude their having an employment relationship with the corporate entity—particularly in the light of the social philosophy of this Act. The Cooperative was not a mere agent for the members in selling their wares; it controlled the activities of the members and was itself the principal responsible to third parties for all business transactions.

C. The decision below would vitiate the corrective effect of the judicial precedents which have heretofore uniformly sustained the Act's application to homeworkers, including this very class of homeworkers. The record shows that these homeworkers are no more truly independent manufacturers or contractors than were the workers under the various plans previously held ineffective to avoid the Act.

D. The Act's coverage of these homeworkers has been confirmed by long-continued legislative approval. In 1949 Congress enacted Section 11(d) which explicitly ratified administrative homework regulations and authorized the administrative restriction or prohibition of homework (*supra*, p. 3). That Congress and every Congress since 1949 have rejected proposed amendments to exempt the class of rural homeworkers involved in this case.

E. The far-reaching impact of this Cooperative on the homeworker problem generally is an economic reality of great relevance. Under the Cooperative's

charter, and under its admitted plans and expectations, its membership and operations can be expanded so as to bring about widespread revival of the serious homework problem not only in the industries immediately involved in this case, but also in other industries in which substandard wage and hour conditions have been aggravated by oppressive child labor—notably in the embrodieries industry (see *Gemsco, Inc.* v. *Walling*, 324 U.S. 244). The charter of the Cooperative explicitly includes in its purposes the manufacture of "embroidered goods of all kinds" (R. 163) and makes "all persons, including married women *and minors* * * *" eligible for membership" (R. 153, emphasis added). That the threat of such a general revival of the homework problem is not merely a theoretical possibility, but a real prospect, is evidenced by the avoidance practices attempted in the embroideries and many other industries since the enactment of this Act, as well as by the expansion of this Cooperative's membership and activities which had already occurred at the time of the trial.

II

Even assuming that the Act's application to homeworkers may be lawfully avoided by a bona fide member-controlled cooperative, the ruling below that Whitaker House Cooperative is such an organization is clearly erroneous. The Cooperative's by-laws, minutes and other documentary evidence, as well as the uncontradicted testimony of Mrs. Whitaker and of the Cooperative's other officers, strikingly parallel the evidence on which the First Circuit predicated

its *reversal* of the district court's comparable finding of a member-controlled cooperative in *Fleming* v. *Palmer*, 123 F. 2d 749, certiorari denied, 316 U.S. 662. Here, no less than in *Palmer*, the evidence considered as a whole, compels a finding that this cooperative is not a bona fide member-controlled organization—at least not in any sense relevant to the coverage of this Act. It follows that Mrs. Whitaker remained the employer.

ARGUMENT

I

THE HOMEWORKER MEMBERS OF WHITAKER HOUSE COOPERATIVE ARE "EMPLOYEES" SUBJECT TO THE FAIR LABOR STANDARDS ACT, WHETHER OR NOT THE COOPERATIVE IS A "BONA FIDE" ORGANIZATION

Introduction

The government's primary position is that, even if the respondent Cooperative be viewed as a bona fide member-controlled cooperative, the homeworkers in this case were employees of the Cooperative or possibly of the Cooperative's managers. We believe that this conclusion follows directly from the principles applicable to the coverage of the Fair Labor Standards Act, taken together with the undisputed facts in this case as to the relationship of the workers with the Cooperative and its managers. Before discussing the particulars of the case, we set forth the general doctrines governing the determination, under this Act, of the employer-employee relationship.

It is well-settled, as both courts below recognized, that "homeworkers generally are included in the statutory definition of 'employee' " of the Fair Labor Standards Act, and that the Act's application to them may not be circumvented by the particular legal labels attached by the parties, if the employment relationship contemplated by the Act actually exists. *Walling* v. *American Needlecrafts, Inc.*, 139 F. 2d 60, 64 (C.A. 6); *Walling* v. *Twyeffort, Inc.*, 158 F. 2d 944, 947 (C.A. 2), certiorari denied, 331 U.S. 851, rehearing denied, 332 U.S. 785; *Fleming* v. *Palmer*, 123 F. 2d 749, (C.A. 1), certiorari denied *sub nom. Caribbean Embroidery Cooperative, Inc.* v. *Fleming*, 316 U.S. 662; *Gemsco, Inc.* v. *Walling*, 324 U.S. 244, 251–252, 257, 259, n. 23; *United States* v. *Rosenwasser*, 323 U.S. 360, 363, n. 4; and the numerous other homeworker decisions cited *infra*, p. 29, fn. 16. See also *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722, 729, n. 8, citing with approval the *Twyeffort* and *American Needlecrafts* decisions, *supra*.

The decision below is the first court of appeals ruling in the 22 years of the Act's operation to hold that application of the Act to homeworkers may be lawfully avoided by a contractual arrangement or organization purporting to convert them into independent self-employed individuals. In our view, the First Circuit has overlooked, not only the broad language Congress used in defining "employee," "employer" and "employ," but also the underlying social and economic reasons for the Act's coverage of homeworkers (including the notoriously low standards for homework in the particular industries here involved—the knitted, crocheted and embroidered wear indus-

tries, see *Gemsco, supra,* and the discussion, *infra,* pp. 25 ff.). Such frustration of the statutory purpose to cover these homeworkers is no more warranted by the cooperative arrangement here (whether bona fide or not[11]) than by the series of previously rejected avoidance arrangements (see *infra,* pp. 28–29, 36–38).

In formulating its definitions of the employer-employee relationship, Congress used the broadest possible terms. "Employ" is to be read as *including* to "suffer or permit to work"; "'[e]mployee' *includes any individual* employed by an employer"; "'[e]mployer' *includes any person* acting directly or indirectly in the interest of the employer in relation to an employee"; and, finally "person" covers not only the usual categories but also "any organized group of persons" (emphasis added). See *supra,* pp. 2–3. The decision of the majority below gives inadequate scope to these all-inclusive words, and likewise reflects a disregard of the economic and statutory considerations which this Court has laid down for determining whether an employment relationship exists under this Act and similar "social legislation of the 1930's," of which "the Fair Labor Standards Act * * * is a part." *Rutherford Food Corp.* v. *McComb,* 331 U.S. 722, 723. These criteria require that the incidents of the homeworkers' relationship to the cooperative organization in the instant case be judged by the "comprehensive" statutory definitions of employment so as to accomplish the broad ameliorative Congressional pur-

[11] See Point II, *infra,* pp. 46–57, for our argument that the Cooperative is not, in fact, a bona fide member-controlled organization.

poses, and that the determination be made "upon the circumstances of the whole activity," not upon "isolated factors" nor upon the particular legal "label" attached by the parties—such as "independent contractor" or "cooperator." See *Rutherford*, 331 U.S. at 729–730; *Walling* v. *Portland Terminal Co.*, 330 U.S. 148, 150–151; *United States* v. *Rosenwasser*, 323 U.S. 360, 362; *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U.S. 111; *United States* v. *Silk*, 331 U.S. 704; *National Labor Relations Board* v. *E. C. Atkins & Co.*, 331 U.S. 398; *Powell* v. *U.S. Cartridge Co.*, 339 U.S. 497, 528 (dissent).[12]

While there is "no definition that solves problems as to the limits of the employer-employee relationship" under this or similar legislation (*Rutherford*, at 728), the broad statutory definitions of this Act—"[a] broader or more comprehensive coverage of employees within the stated categories would be difficult to frame", *Rosenwasser*, 232 U.S. at 362—are not to be summarily dismissed as "hardly helpful" (see opinion below, R. 212). The court's negative view of the legislative definitions also misled it into disregarding the fundamental criteria laid down by this Court. The Court has ruled, for instance, that the terms "employee" and "employer" as defined in such legislation are "not confined to * * * the technical and traditional concepts," but carry with them "the more

[12] As stated by Mr. Justice Frankfurter in *Powell*, *supra*: "Our decisions have made one thing clear about the Fair Labor Standards Act: its applicability is not fixed by labels that parties may attach to their relationship nor by common law categories nor by classifications under other statutes" (citing the *Rutherford* and *Portland Terminal* decisions, *supra*).

relevant economic and statutory considerations" (*Atkins, supra,* at 403); they are "to be construed 'in the light of the mischief to be corrected and the end to be attained' " and "as a matter of economic reality" (*Silk, supra,* at 713) with "an appreciation of economic realities, as well as a recognition of the aims which Congress sought to achieve by [the] statute", "draw[ing] substance from the policy and purposes of the Act, the circumstances and background of particular employment relationships, and all the hard facts of industrial life" (*Atkins,* at 403); and, while Congress may not have "intended to change normal business relationships," through which "a part of [the] industrial process is in the hands of independent contractors" (*Silk,* at 714), where "the work done, in its essence, follows the usual path of an employee," the Act's application is not defeated by the "label" which the parties attach to their relationship (*Rutherford,* at 729) or by "adroit schemes * * * to avoid the immediate burdens at the expense of the benefits sought by the legislation" (*Silk,* at 712).[13]

Judged by these criteria—and indeed even by more conventional technical standards—the status of the respondent Cooperative as a separate legal entity, together with the degree of control retained in the

[13] The application of these criteria to the status of homeworkers under this Act was specifically recognized by this Court's citation in support of its decision in *Rutherford* (*supra,* at 729, n. 8) of the homeworker decisions of the Sixth and Second Courts of Appeal in *American Needlecrafts* and *Twyeffort, supra* (discussed *infra,* pp. 36–38), and apparently also by the denial of certiorari in *Twyeffort* on the same date (331 U.S. 851).

Cooperative's management over the working conditions of these homeworkers, are clearly sufficient to qualify them as employees of respondent Cooperative, or of the Cooperative's managers, under the Act. The homeworkers' meager interests as members of the Cooperative are in no way inconsistent with their status as such employees, which the admitted facts in this record demonstrate has not been truly altered by the cooperative arrangement, any more than by the various devices previously outlawed.

A. *The background and circumstances of the homework problem in the particular industries here involved*

The substandard labor conditions and unfair competition, which the enactment of the Fair Labor Standards Act aimed to correct or eliminate, were notoriously prevalent among the homeworkers in the particular industries immediately affected by the instant case—*i.e.*, the infants' knitted and crocheted wear and women's knitted outerwear industries. These two industries, at the adoption of the Act, were foremost among those whose labor standards were plagued by a serious homeworker problem (see *Industrial Homework Under the National Recovery Administration*, United States Department of Labor, Children's Bureau, Publication No. 234, pp. 21–32). At the time of the N.R.A. study, in 1936, there were reported to be some 17,000 homeworkers, located in 29 states, being utilized in the knitted outerwear industry, large numbers of whom had been recruited in small towns and rural districts by New York manufacturers and dis-

tributors in order to be free from the New York homework law prohibiting work on infants' clothing in tenements (*id.* at 24–25). The homeworkers in the infants' wear branch were the lowest paid in any of the 28 industries then using substantial numbers of homeworkers (*id.* at 2, 28), two-thirds earning less than 5 cents an hour and almost one-half earning no more than 3 cents an hour (*id.* at 13, 17, 28).[14] In the women's knitted garment branch, although the earnings were not quite so low (but only a few of the most skilled earned as much as 15 cents an hour), the evil of excessively long working hours was most prevalent, "a working week of 50, 60, and even 70 hours [being] not uncommon" (*id.*, 40).

Upon enactment of the Fair Labor Standards Act, the significance of the homeworker problem to the enforcement of the statutory minimum labor standards in the knitted outerwear industry (including the infants' wear industry) was at once apparent. During the first year of the Act's operation, the Administrator was confronted with a large-scale overt plan, on the part of the principal manufacturers and distributors

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[14] The present earnings of these homeworkers are still pitifully low, ranging "between 16 and 23 cents" an hour, according to the findings of the court in *Mitchell* v. *Law*, 161 F. Supp. 795, 797 (W.D. Tenn.). As pointed out in fn. 8, *supra*, p. 11, many of Mrs. Law's homeworkers are now members of Whitaker House Cooperative. Their hourly earnings, as determined by the court in *Law*, *supra*, were for bootees for which they received 70 cents a pair (161 F. Supp. 797) or $8.40 a dozen. Whitaker House Cooperative has 33 styles of bootees, and the highest rate per dozen for any style, except Style 40, is $8.00 (R. 12–13). Most of the bootees rates are $5.50, $6.00, $6.50 or $7.50 per dozen (*ibid.*).

in the knitted outerwear industry, to avoid the Act's application to homeworkers by a so-called "purchase and sale" arrangement whereby the homeworkers were designated as "manufacturers" and any employment relationship was explicitly disclaimed. This serious threat to the enforcement of the Act in the industry which employed the lowest paid homeworkers was forestalled, and the problem had been largely resolved by the end of the first year of the Act's operation, by a consent decree issued November 21, 1939, enjoining the 11 principal manufacturers and distributors in this industry from paying any of their homeworkers less than the minimum wage or employing them for longer hours without paying statutory overtime, and, also, specifically, "[f]rom using or adopting any scheme or device, or taking any action directly or indirectly, to evade the provisions of the Act or of this judgment, and in particular but without limiting the generality hereof, from using or adopting any scheme or device involving so-called purchase and sale arrangements with any homeworkers or other employees." *Jacobs* v. *Hand Knitcraft Institute et al.*, Civil No. 6-354 (S.D. N.Y.), not officially reported, 2 Labor Cases (CCH) para. 18,478, page 145.[15]

[15] The effort to avoid the impact of statutory requirements is an old story in the history of remedial legislation regulating employment of workers—a history replete with various methods (by way of independent contractors, corporate forms, partnerships, leases and cooperatives) designed to avoid responsibility under such regulatory statutes. Long prior to the enactment of this Act, the courts had considered and struck down a variety of arrangements which, like the cooperative arrangement here, were aimed to avoid the requirements of social legislation. A

This consent decree was supplemented by inclusion in the Knitted Outerwear Wage Order, issued April 3, 1942, of a prohibition of homework in the industry except by persons who obtained special homework certificates issued pursuant to regulations of the Wage and Hour Division of the Labor Department (*supra,* pp. 3–4; *infra,* pp. 60–67; 7 Federal Register 2592, April 4, 1942, subsequently codified, as amended, in 29 C.F.R., Part 530). These regulations were identical with those issued in connection with the Wage Order for the Embroideries Industry, the validity of which was sustained by the Court in *Gemsco, Inc.* v. *Walling,* 324 U.S. 244, *supra.* There was explicit legislative ratification of these regulations by the enactment of Section 11(d), *supra,* p. 3, in the 1949 Amendments to the Act. During the 18 years since the effective date of the Knitted Outerwear Wage Order restriction on homework, there have been several sporadic attempts (by firms or persons not enjoined by the above consent decree) to avoid or evade the application of the Act and the regulations, but the

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particularly instructive opinion by a New York state court on this subject, with specific reference to homeworkers in the infants' knitwear industry, may be found in *People* v. *Famous Infants' Knitwear Corp.*, 172 Misc. 842, 18 N.Y.S. 2d 167, 169 (Ct. Spec. Sess., N.Y. City, 1939), involving "independent contractor" homeworkers:

> The subterfuge created here is new to the law covering industrial homework. * * * Devious methods to evade the law, however, are not new to this court.
>
> The Workmen's Compensation Law has had its formative years replete with partnership and lease evasions. The courts have uniformly stated that evasion of that law by scheme or device would not be countenanced. [Citing cases.]

consistent judicial condemnation of these attempts,[16] bolstered by the explicit legislative approval in 1949 of the homework restrictions and repeated legislative refusal to enact proposals to exempt rural homeworkers from the requirements of the Act (*infra*, pp.

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[16] For decisions in the infants' knitwear industry alone (in addition to the above-cited *Hand Knitcraft Institute* consent decree), see *McComb* v. *Edward S. Wagner Co.*, 89 F. Supp. 304 (E.D.N.Y.), affirmed in part and reversed in part, *Tobin* v. *Edward S. Wagner Co.*, 187 F. 2d 977 (C.A. 2); *Durkin* v. *Edward S. Wagner Co.*, 115 F. Supp. 118 (E.D.N.Y.), affirmed, *Mitchell* v. *Edward S. Wagner Co.*, 217 F. 2d 303 (C.A. 2), certiorari denied, 348 U.S. 964; *Harwood* v. *Tobin*, 194 F. 2d 538 (C.A. 6), affirming *Tobin* v. *Harwood*, 10 WH Cases 73, 19 Labor Cases Para. 66, 199 (W.D. Tenn.); *Mitchell* v. *Law*, 161 F. Supp. 795 (W.D. Tenn.).

For decisions of Courts of Appeals in relation to other industries, see *Walling* v. *American Needlecrafts, Inc.*, 139 F. 2d 60 (C.A. 6) (embroideries industry); *Fleming* v. *Palmer*, 123 F. 2d 749 (C.A. 1), certiorari denied, 316 U.S. 662 (embroideries industry); *Walling* v. *Twyeffort, Inc.*, 158 F. 2d 944 (C.A. 2), certiorari denied, 331 U.S. 851, rehearing denied, 332 U.S. 785 (garment industry); *McComb* v. *Homeworkers' Handicraft Cooperative*, 176 F. 2d 633 (C.A. 4), certiorari denied, 338 U.S. 900 (bag manufacturing industry).

The district court decisions involving homeworkers in such other industries are legion. See *Walling* v. *Wolff*, 63 F. Supp. 605 (E.D.N.Y.) (embroideries industry); *Walling* v. *Frank*, 62 F. Supp. 261 (W.D. Ky.); *Walling* v. *F. L. Dunne Co.*, 7 WH Cases 317 (D. Mass.), 13 Labor Cases (CCH) para. 64,045; *Walling* v. *Malouf*, 7 WH Cases 1068 (S.D. Calif.), 12 Labor Cases (CCH) para 63,740 (garment industry); *Mitchell* v. *Roberts*, 179 F. Supp. 247 (S.D. Calif.); *Mitchell* v. *American Republic Ins. Co.*, 151 F. Supp. 529 (S.D. Iowa); *Durkin* v. *Shone*, 112 F. Supp. 375 (E.D. Tenn.); *Walling* v. *Sieving*, 5 WH Cases, 1009 (N.D. Ill.), 11 Labor Cases (CCH) para. 63,098 (direct mail advertising industry); *Mitchell* v. *Northwestern Kite Co.*, 130 F. Supp. 835 (D. Minn.); *Walling* v. *Hastings*, 6 WH Cases 554 (S.D. Ind.), 11 Labor Cases (CCH)

40–43), has thus far prevented the revival of a serious homeworker problem in this and other industries.

B. *The record reveals the respondent Cooperative to be a legal entity separate from its individual members, retaining in its managing officials a degree of control more than sufficient to qualify as the homeworkers' employer under the Act*

The incorporation of the respondent Cooperative as a legal entity and business organization separate from its members, with substantial retention of control in a few managing officials, should be considered sufficient, even by common law standards, to classify the Cooperative as the homeworkers' employer under the Act. The reasoning of the court below that the work done by the producer-members of the Cooperative is not performed as employment because "'[t]heir interests as members and producers are identical'" (R. 221), is inconsistent with this Court's decisions holding that a cooperative or corporation, deliberately organized as "an independent entity," is "a separate business organization" from its members, and that its independent status may not be disregarded in order to avoid statutory obligations imposed for the protection of the public. *Farmers Irrigation Co.* v. *McComb*, 337 U.S. 755, 768; *Boutell* v. *Walling*, 327 U.S. 463,

para. 63,485; *Nelson* v. *Kuepper Favor Co.*, 1 WH Cases 854 (N.D. Ill.) (novelty manufacturing industry); *Walling* v. *Freidlin*, 66 F. Supp. 710 (M.D. Pa.) (rug industry); *Fleming* v. *Demeritt Co.*, 56 F. Supp. 376 (D. Vt.) (clothespin manufacturing industry); *Mason* v. *T. & P. Optical Mfg. Co.*, 42 F. Supp. 98 (S.D.N.Y.) (optical industry); see also *Mitchell* v. *Sulahian* (D. Mass., Dec. 7, 1960), 14 WH Cases 840 (novelties and dolls).

468, see also *National Labor Relations Board v. Milk Producers Assn.* (C.A. 10, decided Nov. 12, 1960), 47 LRRM 2294; *Schenley Corp.* v. *United States,* 326 U.S. 432, 437. As pointed out in Judge Aldrich's dissent (R. 224), even if the homeworkers had a true proprietary interest in the Cooperative and a real voice in its management, this would not preclude their having an employment relationship with the corporate entity, particularly in the light of the social philosophy of this Act.

Not only does the statutory definition of "employer" include "*any* person acting *directly or indirectly* in the interest of an employer", defining "person" to mean 'individual, partnership, association, *corporation* * * * *or any organized group of persons*" (Sections 3(a) and (d), emphasis added, *supra* pp. 2–3), but the legislative history confirms the Congressional intent to include cooperatives within the scope of the Act.[17] The majority below, however, found neither the Act's broad definitions of employment nor this Court's decision in *Farmers Irrigation* to be "helpful" (R. 220). *Farmers Irrigation* was brushed aside because it "did not involve the question whether member-producers of a cooperative are

[17] In the earliest discussions of the legislation it was specifically pointed out that the general statutory language would apply to cooperative organizations unless specific exemptions were framed to exclude them. See 81 Cong. Rec. 7873, 7876, 7927. An amendment exempting specified cooperative associations was introduced by Senator Borah and adopted by the Senate. 81 Cong. Rec. 7947. A similar proposal was introduced in the House. 82 Cong. Rec. 1776. These provisions were omitted from the Act as adopted.

considered employees of the cooperative" (R. 220).[18] But the fact that this precise question was not presented to the Court does not detract from the force of the legal principle for which *Farmers' Irrigation* stands—that an incorporated cooperative is an entity separate from its individual members.

Even if the corporate form of doing business had not been adopted, the Cooperative would still be "an independent entity within the meaning of the Act," as the dissenting opinion points out, for it is plainly an "'organized group of persons'" (R. 223). As such, it is "an entity separate and distinct from the individual members thereof" (*National Labor Relations Board* v. *Milk Producers Assn.*, *supra*) with "a being of its own which transcends mere 'agency' for the individual [members]." See *United States* v. *Kintner*, 216 F. 2d 418, 424, n. 1 (C.A. 9), citing *Maryland & Virginia Milk Producers Ass'n* v. *District of Columbia*, 119 F. 2d 787, 791–792 (C.A.D.C.), and *American Medical Assn.* v. *United States*, 317 U.S.

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[18] The legislative history (*supra*, fn. 17), was dismissed on the same ground. It is, however, enlightening even though the references do not, in context, specifically deal with working members of a cooperative. These references show that Congress was not only aware of the existence of cooperatives, but also that it knew that the general statutory language would apply to such organizations unless specific exemptions were framed to exclude them and, knowing this, rejected every proposal to exempt cooperatives. There is thus special reason for application of the principle precluding "enlargement by implication" of the specific and detailed exemptions provided in the Fair Labor Standards Act. *Addison* v. *Holly Hill Co.*, 322 U.S. 607, 617; *Powell* v. *United States Cartridge Co.*, 339 U.S. 497, 517.

519, 528. Clearly, the meager rights and interests of the homeworkers as members of the Cooperative are in no way inconsistent with their employment status—as is demonstrated by the rhetorical questions in the dissenting opinion below (R. 224): "If a union were given a voice in management, would its members cease to be employees? If an employee acquires stock in his company, does he cease to be an employee?" There is nothing unusual in recognizing the simultaneous coexistence of proprietary and employment relationships—this has been done where the proprietary interests have been much clearer and more valuable than any such interests of the homeworkers here—particularly where the application of remedial legislation is involved. See, *e.g.*, *Hoy* v. *Progress Pattern Co.*, 217 F. 2d 701, 704 (C.A. 6) (stockholder-officer-director held not precluded from "also being an employee covered by the [Fair Labor Standards] Act").[19]

The admitted facts in this record show that these homeworkers are not truly independent manufacturers or contractors, and that their interests as members of the Cooperative are fully consistent with their status as employees under the Act. Before becoming members, all of the homeworkers, except the

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[19] See also, *Dewey Products Co.* v. *Welch*, 124 F. 2d 592 (C.A. 1) (a social security case involving an attorney, director and stockholder); *Houghton* v. *Texas State Life Ins. Co.*, 166 F. 2d 848 (C.A. 5), certiorari denied, 335 U.S. 822 (president, director, and stockholder of corporation); *Van Doren* v. *Van Doren Laundry Service*, 162 F. 2d 1007 (C.A. 3) (office manager, director, and owner of 20 percent of the voting stock); *Parker* v. *Maynard Boyce, Inc.*, 74 F. Supp. 581 (S.D. Cal.).

few original incorporators,[20] must prove their qualification as knitters by purchasing a sample of work from the Cooperative, copying it, and submitting the copy for approval by the Cooperative's Board of Directors or authorized representative, in addition to purchasing a membership interest at a cost of $3.00, and agreeing to abide by the Cooperative's by-laws, and all rules and regulations made by the Board in connection with their general authority "to manage the affairs of the Cooperative." The by-laws, which were prepared in advance by respondent Bird (respondent Whitaker's attorney) and approved by the few original incorporators, provide that members may not withdraw from membership for at least a year, and may not make or sell to any other business products similar to those produced by the Cooperative;[21] they may be "expelled" for failure to observe the by-laws or any rules and regulations. The Cooperative's Board or managing officials have the authority to pass upon membership applications and to "expel" members for substandard work and for failure to observe the by-laws, rules and regulations, *i.e.*, to hire and fire the homeworkers. In addition, the Board or the managers fix the "prices" or piece rates which are paid to the "member-producers," and instruct them as to the designs and colors to be used in the work.

[20] At the time of the trial of this case, there were some 200 homeworker-members (R. 17–23); only 26 were original incorporators (R. 201).

[21] The homeworkers here thus have even less independence than they had under the *Wagner* arrangements (*supra*, p. 5), which left them free to offer their goods to others, and as pointed out by District Judge Kennedy, "some * * * sold their goods elsewhere" (89 F. Supp. 304, 305).

See the Statement, *supra,* pp. 10–11. Moreover, as pointed out in the dissenting opinion below (R. 222–223), it is clear that the Cooperative is controlled, at most, by "only some" of the members, and that most of the homeworkers "do not exercise, and * * * are unable to exercise, any control, effective or otherwise," so that at least "all inactive members differ in no respect from employees of any homework employer."

Finally, it is plain that the Cooperative is the real principal with respect to transactions with third parties—in selling the wares, collecting payment for them, making good on warranties, etc. The Cooperative is not merely the agent of the members, but is itself the principal. Those dealing with it would look to it, not to the individual members, if any dispute arose as to the sale or purchase of the commodities marketed by the Cooperative.

C. *The decision below is contrary to the prior decisions which have sustained the Act's coverage of homeworkers; including this class of homeworkers*

Prior to the decision in the instant case, every court of appeals which had occasion to rule on the application of the Act to homeworkers held them to be employees subject to the Act, regardless of the legal arrangement designed to avoid coverage (see *supra,* p. 29, fn. 16). The facts of those cases are closely analogous to the present one, and the arrangements are indistinguishable in any respect relevant to coverage. See, in particular, the First Circuit's own earlier decision in *Fleming* v. *Palmer,* 123 F. 2d 749,

certiorari denied *sub nom., Caribbean Embroidery Cooperative, Inc.* v. *Fleming,* 316 U.S. 662, the Sixth Circuit's decisions in *Harwood* v. *Tobin,* 194 F. 2d 538, and *Walling* v. *American Needlecrafts, Inc.,* 139 F. 2d 60, and the Second Circuit's decisions in *Mitchell* v. *Edward S. Wagner Co.,* 217 F. 2d 393, affirming 115 F. Supp. 118 (E.D.N.Y.), certiorari denied, 348 U.S. 964, and *Walling* v. *Twyeffort, Inc.,* 158 F. 2d 944, certiorari denied, 331 U.S. 851. As noted *supra,* p. 24, the *American Needlecrafts* and *Twyeffort* decisions were cited with approval by this Court in its *Rutherford* opinion.

The *Wagner* and *Harwood* decisions concerned some of the very homeworkers in the instant case who are now making the same kind of knitted and crocheted articles for respondents under virtually the same conditions, despite formal differences in the efforts to cloak reality in new conceptual guise. In *Wagner,* which involved New England homeworkers, the device was a "purchase and sale" arrangement, and in *Harwood,* involving Tennessee homeworkers, it was a "*del credere* agency" arrangement.[22]

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[22] *Harwood* and *Wagner* were the decisions which motivated unsuccessful legislative proposals discussed *infra,* pp. 41–43.

The majority below ignored these decisions apparently because they did not involve the cooperative form, but relied instead on the district court's decision in *Walling* v. *Plymouth Mfg. Corp.,* 46 F. Supp. 423 (N.D. Ind.), affirmed on other grounds, 139 F. 2d 178 (C.A. 7), certiorari denied, 322 U.S. 741. Apart from the fact that *Plymouth* did not involve either homeworkers or the incorporated cooperative device, the case was decided before this Court's *Hearst, Silk,* and *Rutherford* decisions, and its holding is out of line with the great body of law interpreting social legislation. It is also to be noted that, while the court permitted the officials in control of the

The decision below should also be compared with the Fourth Circuit's decision in *McComb* v. *Homeworkers' Handicraft Cooperative,* 176 F. 2d 633 (C.A. 4), certiorari denied, 338 U.S. 900; and with the First Circuit's own earlier decision in *Fleming* v. *Palmer, supra,* discussed more fully *infra,* pp. 46 *ff.* These cases, as the court below apparently recognized, involved cooperative organizations paralleling the legal form of the Whitaker House Cooperative. The court's distinction of the instant case on the ground of the "district court's finding of a *bona fide* cooperative with control by the member-producers" (R. 218) is not borne out by the *Homeworkers' Handicraft* decision. The Fourth Circuit there reversed the district court, despite the finding that the homeworkers were "independent contractors functioning through the cooperative" (176 F. 2d at 635), stating (through Chief Judge Parker) that the homeworkers' status as employees "has not been affected by the organization of the cooperative, whatever view be taken as to who exercises the real control over it" (*ibid.*) and approving as "manifestly sound" the view "that the 'law of independent contractors,' so far as the Fair Labor Standards Act is concerned, cannot nullify the will of Congress, and take away the benefits of the

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business (the "senior partners") to escape responsibility as the "employer," it expressly declined to decide whether the enterprise was operated by "a partnership composed of all the parties who signed the so-called partnership agreement" or whether, assuming the existence of "such larger partnership * * * the workers [the so-called junior partners"] were employees and the partnership was employer within the meaning of the Fair Labor Standards Act" (139 F. 2d at 182).

statute from pieceworkers in the needlework trades, even in the absence of a showing of domination and control." Referring to "the carefully considered decision of *Walling* v. *American Needlecrafts,*" 139 F. 2d 60 (C.A. 6), *supra,* p. 36, Judge Parker said it was "on 'all fours' with the case here, except as to the effect of the intervention of the cooperative," 176 F. 2d at 637.[23] In *American Needlecrafts,* there was a district court finding, comparable to the finding in the instant case, that the contract had been "bona fidely entered into" (46 F. Supp. 16, 23 (W.D. Ky.)), and the opinion of the court of appeals was not predicated upon any different assumption. Nor was there any suggestion in the *Harwood* and *Twyeffort* decisions, *supra,* that the contracts were not equally "bona fide."

These decisions, like numerous rulings on other aspects of the Fair Labor Standards Act, rest upon the premise that the statutory requirements are "mandatory * * * regardless of the good faith of the employer." *Rigopoulos* v. *Kervan,* 140 F. 2d 506, 507 (C.A. 2). As this Court has stated, "The statute was a recognition of the fact that * * * certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce." *Brooklyn Savings Bank* v.

[23] Also, contrary to the apparent assumption by the court below, the Fourth Circuit directed that the decree enjoin the cooperative as well as the bag companies, thus indicating its view that the cooperative was also the employer of the homeworkers

O'Neil, 324 U.S. 697, 706–707; see also *West Coast Hotel Co.* v. *Parrish,* 300 U.S. 379, and cases cited at pages 392–393.

Thus, even if it be assumed that there was absolute good faith in organizing and executing a member-controlled cooperative, this would not suffice to alter the homeworkers' well-settled status as employees under the Act. Under the governing criteria, the "more relevant economic and statutory considerations" (see *supra,* pp. 23–24) are whether such a "bona fide" arrangement has, in fact and in economic reality, so changed the status of the homeworkers as to make them, by standards of "normal business relationships," truly independent self-employed producers or entrepreneurs (cf. *Silk,* 331 U.S. at 714), or whether their interests and obligations under the cooperative arrangement are not "entirely consistent with" and "of a type that did not alter their status as employees under the Act" (cf. *Labor Board* v. *Atkins, supra,* 331 U.S. at 405–406).

As we have shown, *supra,* pp. 2–13, 33–35, the actual relationships between the homeworkers, on the one hand, and the Cooperative and its managers, on the other, accord with the normal relationships between an employer and his employees. The members are not, in reality, independent or self-employed. The situation is not one of the established "normal business relationships through which one business organization obtained the services of another to perform a portion of production or distribution" (cf. *Silk,* 331 U.S. at 714). On the contrary, this cooperative arrangement, like others which the courts have uni-

formly rejected over the years, is a formal and verbal device for avoiding regulation of a relationship which the Act was intended to cover, without changing the normal business relationships in any substantial respect.

D. *Coverage of these homeworkers is confirmed by the legislative ratification of the administrative restrictions upon homework and by the repeated legislative rejection of proposed amendments to exempt this class of rural homeworkers*

In 1939, before the Act was a year old, several bills were introduced in the House of Representatives for the purpose of amending Section 14 so as to authorize the Administrator specifically to permit the employment of rural homeworkers at wage rates lower than the statutory minimum.[24] In its report accompany-

[24] H.R. 5435, the first Norton bill, amended by the House Committee on Labor; H.R. 6406, the second Norton bill; H.R. 7133, the Barden bill; H.R. 7349, the Ramspeck bill. The bills were virtually identical in their proposal for the amendment of Section 14, as follows: "The Administrator shall promulgate regulations permitting the employment, in rural areas, of employees in the home at such wages lower than the minimum wage applicable under Section 6, and containing such provisions governing the piece rate to be paid, the time of day during which such work shall be performed, and such other provisions, as the Administrator may prescribe. No such regulation shall be promulgated with respect to any employees (1) if in the opinion of the Administrator the application of section 6 to such employees does not have the effect of curtailing the opportunities of such employees for employment; (2) if the promulgation of such regulation would in the opinion of the Administrator have the effect of curtailing employment in the factories or industrial establishments, if any, in which similar work is performed; or (3) if the promulgation of such regulation would in the opinion of the Administrator give the em-

ing the proposed amendment for homeworkers, the House Committee on Labor stated: "The act at the present time treats homeworkers just as any other type of employee" (H. Rept. 522, 76th Cong., 1st Sess., p. 10). It was argued that the proposed amendments would restore to rural people additional income which they could earn from industrial homework if the wage and hour requirements were lifted. (86 Cong. Rec. 4924, 5122). But the amendments were finally rejected because of the conviction that the economic evils which the Act prohibited should not be restored and that the original legislative aim to include industrial homeworkers within the full scope of the Act was in every respect sound. See, *e.g.*, 86 Cong. Rec. 5225, 5136.

Following this compelling evidence of the original and continuing Congressional intent to include homeworkers within the scope of the Act, the Administrator issued regulations restricting the employment of homeworkers in the several industries in which homework was found to be most prevalent. Although Congress was repeatedly advised of the issuance of these regulations in the Administrator's annual reports,[25] no further attempt to exempt rural homeworkers was made until the 1949 Amendments were under consideration. At that time, Congressman Cooper of Tennessee proposed, and the House adopted (95 Cong. Rec. 11209–11210), an amendment which would have

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ployer or employers of such employees a substantial competitive advantage."

[25] Annual Reports of the Administrator to Congress 1943, pp. 19–20; 1944, p. 17; 1946, p. 5; 1947, pp. 32–33; 1948, pp. 15–17; 1949, p. 29.

exempted from the Act "any homeworker in a rural area who is not subject to any supervision or control by any person whomsoever, and who buys raw material and makes and completes any article and sells the same to any person, even though it is made according to specifications and the requirements of some single purchaser" (Section 13(a)(17) of H.R. 5856). In explaining "the situation sought to be taken care of by this amendment," Congressman Cooper said (95 Cong. Rec. 11209):

> There are several hundred women throughout Tennessee, mostly around Gibson County * * * who have for several years made crocheted and knitted articles of wearing apparel, principally for babies, and sold them to anyone who might want to purchase them. In recent years Mrs. Doris Harwood, of R.F.D., Trenton, Tenn., has been operating a small business from her home, about 4 miles from Trenton. She buys these articles from the women of that section, who are largely farmers' wives. * * *.
>
> * * * * *
>
> It is my understanding that the Wage and Hour Division * * * has notified Mrs. Harwood that she could not buy any of this crocheted wearing apparel from any of these women unless they were physically handicapped and that they were required to have a medical certificate to this effect before they could make these articles and sell them to her.[26]

[26] This is the same Mrs. Harwood who was enjoined from employing and underpaying non-certificated homeworkers in *Harwood* v. *Tobin*, 194 F. 2d 538 (C.A. 6), affirming *per*

The Senate bill contained no such exemption. The conference agreement followed the Senate. The Conference Report makes it clear that the omission was not unintentional. H. Rept. 1453, 81st Cong., 1st Sess., 95 Cong. Rec. 14933. On the contrary, subsection 11(d) (*supra*, p. 3) was added, continuing in full force and effect the administrative regulations and authorizing the Administrator to restrict or prohibit homework. 95 Cong. Rec. 14927. In every Congress since 1949, bills identical to Congressman Cooper's proposal have been offered. None gained approval.[27] This informed Congressional acquiescence in the broad application of the Act to homeworkers should be given special weight.[28]

E. *Respondent cooperative, under its charter and the decision below, can be readily expanded so as to cause general widespread revival of the homeworker problem*

The court below, absorbed as it was in the "predicament" of the particular homeworker ladies immedi-

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curiam the decision of the district court (not officially reported), 10 WH Cases 73, 19 Labor Cases Para. 66, 199 (W.D. Tenn.). See *supra*, pp. 36–37.

[27] H.R. 4661, 82d Cong., 1st Sess., Congressman Cooper; H.R. 237, 83d Cong., 1st Sess., Congressman Cooper; S. 1950, 83d Cong., 1st Sess., Senator Kefauver; H.R. 84, 84th Cong., 1st Sess., Congressman Cooper; S. 2963, 84th Cong., 2d Sess., Senator Payne; H.R. 8809, 84th Cong., 2d Sess., Congressman McIntire of Maine; H.R. 2818, 85th Cong., 1st Sess., Congressman McIntire; S. 1160, 85th Cong., 1st Sess., Senator Smith of Maine; S. 25, 86th Cong., 1st Sess., Senator Smith; H.R. 5713, 86th Cong., 1st Sess., Congressman McIntire.

[28] *United States* v. *American Trucking Ass'ns.*, 310 U.S. 534, 543; *Alstate Construction Company* v. *Durkin*, 345 U.S. 13, 17; *Maneja* v. *Waialua Agricultural Co.*, 349 U.S. 254, 270; *Steiner* v. *Mitchell*, 350 U.S. 247, 255.

afely concerned (see Judge Aldrich, R. 224), appears to have paid no heed to the far-reaching impact of this Cooperative on the homeworker problem generally, in other industries as well as in the knitted infants' wear industry.

While the Cooperative had acquired, at the time of trial, only 200 homework members located primarily in rural areas of Maine and Tennessee (but also a few scattered members in nine other states, R. 17–23), its charter is not limited to any particular regions nor to knitted infants' wear, but includes in its purposes "[t]o manufacture, sell and deal in knitted, crocheted, and embroidered goods of all kinds and in *general to carry on a knitted wear business*" (R. 163; emphasis added), and its by-laws provide for unlimited expansion by making "[a]ll persons, including married women *and minors*, firms and corporations * * * eligible for membership" (R. 153, By-laws, Art. 6, Sec. 1; emphasis added). That such expansion is not a mere possible contingency, but a very probable prospect, is evident from the expansion already made (to include toys and women's capes and stoles) and from the groundwork laid by extension of membership to homeworkers scattered in eleven different states, that had already occurred at the time of trial (see the Statement, *supra*, pp. 11–12). As testified by the Cooperative's accountant, "[m]any people, there is no question, are waiting to see how this [case] comes out" before they "send anything into the Cooperative," and it is expected that the Cooperative

"will be swamped with business" if "the Cooperative and its officers should prevail in this action" (R. 151).

Thus, under the ruling below, the homeworker problem in the embroideries industry, which has been regarded as settled by this Court's decision in *Gemsco, Inc.* v. *Walling*, 324 U.S. 244 (upholding the validity of the regulations prohibiting homework in this industry), could be revived simply through expansion of the membership and business of the respondent Cooperative. An aggravated aspect of this threatened revival is its child labor implications. As pointed out in *Gemsco*, it was undisputed that in the embroideries industry, in addition to the prevalence of substandard piece rates, "hidden child labor [was] a widespread characteristic of the system, discoverable only after extensive investigation presenting an almost insurmountable problem for enforcement agencies, employers and homeworkers themselves" (324 U.S. at 253, n. 17). As this Court has noted, the employment definitions of the Act apply to its child labor restrictions as well as to the wage and hour standards (see *Rutherford, supra*, 331 U.S. at 728). Even if there were reason to believe that this particular Cooperative would not expand its operations into other industries, the effect of the decision below on other industries would nonetheless be substantial, since the same disposition to avoid the Act's application to homeworkers has been evidenced in other industries to which the cooperative form of organization here involved is readily adaptable.

II

THE RULING BELOW THAT WHITAKER HOUSE COOPERATIVE IS A BONA FIDE MEMBER-CONTROLLED ORGANIZATION IS CLEARLY ERRONEOUS

We recognize that ordinarily this Court will not review concurrent factual findings by two courts below, but we suggest that, with respect to the finding that the respondent Cooperative was a bona fide member-controlled organization, review is warranted because the First Circuit's affirmance of the district court's conclusion in this case is very difficult to reconcile with its earlier action in the entirely comparable case of *Fleming* v. *Palmer*, 123 F. 2d 749, *supra*, pp. 35–36, and also because the "finding" was, in effect, a determination of the ultimate legal issue—whether the homeworkers are independent and self-employed—based upon "inferences * * * drawn by the courts from facts concerning which there is no real dispute" (cf. *Silk, supra*, 331 U.S. at 716–717).

Not only do the admitted facts in this record establish that most of the homeworker-members had nothing to do with the original organization of this Cooperative and exercise no control over its operations (*supra*, pp. 2–13, 33–35), but the evidence "considered as a whole * * * compels a finding that [the individual respondents] controlled this cooperative", no less than Palmer controlled his cooperative (*Palmer, supra*, at 759). Accordingly, Mrs. Whitaker remained the employer of the homeworkers as she had been before—or, if the Court should view the Cooperative as not entirely a sham organization, but still not bona fide

member-controlled, the Cooperative itself could be considered the employer.

Whether or not respondents here may have had some genuine intent to assist the homeworkers in utilizing their time and skills to their best financial advantage, the finding below that the Cooperative is a "bona fide * * * member-controlled cooperative," for the purposes of this Act, is plainly contradicted by the evidence. While respondents, educated by the *Palmer* decision, avoided some of the most blatant "mistakes" made by Palmer, the organization and operation of the Whitaker Cooperative have paralleled the Palmer Cooperative[29] in all respects material to true membership control. Indeed, the First Circuit's *reversal* of the district court's comparable finding of a member-controlled cooperative in *Palmer* was predicated on essentially the same kind of evidence contained in this record—the Cooperative's by-laws, minutes and other documentary evidence, as well as the testimony of respondent Whitaker and of the Cooperative's other officers, concerning which there is no conflict (cf. 123 F. 2d at 751).

The first factor which the Court of Appeals considered significant in *Palmer* was the fact that Palmer "actively participated in the organization of the cooperative for the express purpose of avoiding the Fair Labor Standards Act" (123 F. 2d at 759). "This fact," said the court, "is not an element bringing him

[29] Respondent Bird stated to the court below that he conceived the idea of a cooperative from reading that court's *Palmer* decision. This case had been cited to him by the Labor Department's regional attorney in a letter dated January 2, 1957 (Petitioner's Exhibit No. 1).

within the scope of the Act, but his motive does have some probative value on the issue of control for it shows that he was actuated not so much by a desire to benefit his workers as by fear of loss to himself" (*ibid.*). This is no less true in the instant case. Although Mrs. Whitaker never admitted her part in the organization of the cooperative,[30] the trial court was impelled to find—and its finding has not been challenged—that she and her attorney, respondent Bird, "actively participated in the organization of the

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[30] Thus, when asked who it was that had suggested the organizational meeting, she replied "I don't think I could answer that" (R. 42). She also stated that she could not say "who made the arrangements and notified the people to be present" (*ibid.*). Nor could she remember who had sent the notices out to the homeworkers (R. 44), although it was her own attorney (R. 190). Her memory was equally bad when she was asked whether she knew who had furnished the list of persons to whom notices should be sent (R. 44). Although Mrs. Whitaker's poor memory did not deter her from being positive that one of the Wage and Hour Division's investigators first suggested that she change her business over to a cooperative (R. 41), it was later stipulated by the parties "that the idea of a cooperative did not originate with the Wage and Hour Division; and that 'the idea of organizing a cooperative arose spontaneously as a result of * * * joint discussions, no one participant in the discussions being solely responsible'" (R. 200). Cf. attorney Bird's admission (fn. 29, *supra*, p. 47).

Equally contradictory was Mrs. Whitaker's testimony concerning conferences with her attorney, respondent Bird. At one point she claimed that Mr. Bird has represented her "[j]ust since June" of 1957 (R. 119) when the cooperative was organized. At another point, however, she admitted that she had conferred with him "[e]arly in '57" (R. 40). And when asked how many times she had talked with Mr. Bird prior to the organizational meeting, she replied: "I couldn't tell you" (R. 44); she could not even give a rough "idea" (*ibid.*).

Cooperative for the express purpose of attempting to avoid application of the Fair Labor Standards Act to the homeworkers here involved" (R. 209). Like Palmer's attorney, Mrs. Whitaker's attorney advised "as to the details of organizing the cooperative" (R. 44), "suggested each step of the way as the workers knew nothing about a cooperative" (123 F. 2d at 753), and prepared the articles of association, the by-laws and other formal papers in advance of the meeting, which was ostensibly called to consider whether a cooperative should be formed at all. Within a few hours, the articles of association were signed by the incorporators, the by-laws were adopted, and directors elected (R. 201–203).

The next factor considered indicative of the homeworkers' "state of economic subservience" to Palmer was that they had been "told that their livelihood is dependent on the continued existence of the cooperative, and they know that he can deal it the death blow at any time by rescinding the contracts and proceeding to the liquidation of the large debt owing him" (123 F. 2d at 759). While Mrs. Whitaker did not flatly tell the homeworkers that they would be without work if they did not form a cooperative, the organizational letter, albeit more artfully phrased, made it clear enough that if the homeworkers "want to continue to make products in your home" and "have a ready market for the products" (R. 190), formation of a cooperative was the "only way" (R. 192), since it "would enable them to comply with [*i.e.*, avoid] the Federal Laws concerning wage and hour regulation" (R. 191). This not-too-subtle hint that the home-

workers' previous earnings would be discontinued unless they cooperated with Mrs. Whitaker in changing over to the cooperative form was unquestionably the compelling reason for their participation. That their interest did not go beyond mere continuance of their homework as before was made clear by the testimony of Mrs. Leavitt, who had worked for Mrs. Whitaker as a trimmer and also as a homeworker, and who is now a member of the Cooperative's Board of Directors (R. 202). When asked what the cooperative had done for its members, she said: "It is or has enabled them to keep on working in their homes. I think that is the main thing it's done for them" (R. 127).

Like Palmer, Mrs. Whitaker, also, is in a position to deal the "death blow" to the cooperative at any time. She is its largest creditor, being due $7,908 for unpaid "salary" and the balance still due on the inventory which she "sold" to the Cooperative (R. 193). In addition, she owns the premises (her home) in which the Cooperative has its principal and only place of business.

Also indicative of the absence of intent to give the homeworker-members any real control over the cooperative is the fact that not one of the 40 homeworkers who attended the organization meeting became an officer. Respondent Bird, Mrs. Whitaker's attorney, was elected president, and his father, Stanley Bird, became clerk. Mrs. Whitaker was made Secretary-Treasurer, and a retired electrician (Jack Kennedy), who is a cousin of Mrs. Whitaker's husband (R. 85, 202), was elected Vice-President. Kennedy's election to office was patently in violation of the by-laws which

make membership in the cooperative a requisite for holding office, and limits membership in the cooperative to the original incorporators and qualified crocheters and knitters. Not only was Kennedy not one of the original incorporators (R. 164), but his talents as a crocheter or knitter nowhere appear in the record. The inference is plain that he was simply Mrs. Whitaker's nominee.[31]

Supervision of the Cooperative is nominally in its Board of Directors, but their supervision is obviously "in fact only perfunctory", cf. *Bowles* v. *Villari,* 61 F. Supp. 784, 787 (E.D. Pa.), affirmed *sub nom. Porter* v. *Villari,* 156 F. 2d 690, 691 (C.A. 3). While it would appear from the minutes of the Board meetings that the matters discussed and acted upon were brought up by the members themselves, attorney Bird himself disclosed the true meaning of this when he asked a director-witness to state what he (Bird), as president, did at the monthly meetings. In Bird's own words, he presented the "problems that it was necessary for the Board of Directors to decide" (R. 115). Admittedly, Bird has attended all Board and membership meetings except one, the annual membership meeting held in June 1958 (R. 206), and present in his place at that meeting was Burton G. Shiro, also an attorney from Waterville, Maine, who served as "parliamentary counsel," in which capacity he "discussed the Government action against the Coopera-

[31] No other reasonable explanation can be found in the record for Kennedy's association with the cooperative (from which he receives no salary) and his willingness to endorse personally its note for $5,000 given to secure a bank loan made by the cooperative (R. 82–83).

tive" and "expressed the opinion that * * * the members are independent contractors and not employees" (R. 181).

Thus, it is not remarkable that the Board—theoretically described as a limitation on the individual respondents' control—was actually subservient. In over a year of operation, the members of the Board did not once disagree on a single action; all motions or resolutions passed, according to the minutes, by unanimous vote. The absence of any real supervision of operations by the Board also plainly appears from Mrs. Whitaker's testimony that she often left Board meetings after giving her report, and never bothered to read the minutes (R. 103), although they purportedly contained the instructions of the Board which she was to follow in carrying out her functions as general manager.

As in *Palmer,* the organizational set-up here was plainly "calculated to leave control in a very small group which was most naturally inclined to be friendly to [respondents Whittaker and Bird]" (123 F. 2d at 760). As we have pointed out, the officers elected at the first Board meeting were Mrs. Whitaker, her attorney, her attorney's father, and her husband's cousin. Although one homeworker-member is now serving as treasurer, having been "appointed" to the office by the Board (despite the requirement of the by-laws for election of officers by the members, see *supra,* p. 10, fn. 6) when Mrs. Whitaker resigned from it (R. 172), we think it may be safely assumed that she is friendly to Mrs. Whitaker.[9] At any rate, the fact that the office of Secretary-Treasurer has been

split does not mean that the group in control is now any larger. For the new treasurer is not only one of the members of the Board, but is Chairman of the Board and one of its most faithful members, never having missed a meeting (R. 136). Of the five present directors, (including the one who also serves as treasurer) each had been one of Mrs. Whitaker's homeworkers and two had also worked for her as trimmers (R. 202).

The instant case parallels *Palmer* in still another important respect. There, as the First Circuit noted, Palmer admitted that the business "'is continued and still continues almost the same as before the cooperative was established'" (123 F. 2d 759). Here, too, the business has been continued and operates essentially the same as before the cooperative was formed. Despite Mrs. Whitaker's understandable reluctance to admit this on the stand, the only changes she could point to, apart from the formalities necessarily attending the corporate form of operation (see, *e.g.*, R. 95, 97), were changes attributable to growth and expansion, such as new accounts and different customers (R. 47), increased sales (R. 106), and the addition of a new line of knitwear or knit goods consisting of women's stoles (*ibid.*) and woolen toys (R. 107). Mrs. Whitaker had to admit that her own work after the formation of the cooperative "was substantially the same" except that she no longer does any selling (R. 49). As pointed out in the Statement, *supra*, pp. 5, 11, the selling was transferred to Mrs. Doris Law under an "exclusive sales" agreement (R. 206), almost from the beginning. This, in itself, is

good reason for questioning the bona fides of the cooperative. Since Mrs. Law has been enjoined from employing homeworkers in the infants' knitwear industry in violation of the Act, it would appear that what has actually happened here is that she and Mrs. Whitaker have joined forces. This obviously accounts for the fact that the Cooperative has such a large number of members in Tennessee where Mrs. Law previously conducted her business. It also explains why the Cooperative has new accounts and many more customers than did Mrs. Whitaker in her previous operation.

While Mrs. Whitaker tried to convey the impression that the homeworkers, not she, were instrumental in forming the Cooperative, and that the part which she would have in the Cooperative was not determined beforehand, her claim is plainly invalid. Although certain that she became the Cooperative's general manager from the start, she could not remember how it happened (R. 45–46). And while asserting that her arrangements with the Cooperative were worked out at arms' length, it appears that "nothing was ever reduced to writing between the parties" (R. 67),[32] and that Mrs. Whitaker never delivered or even executed a bill of sale to the Cooperative when, as she testified, she turned her business over to it "[l]ock, stock and barrel" (R. 45, 66). Only Mrs. Whitaker's identity with and assured control over the Cooperative

[32] In the *Villari* case, *supra*, the trial court expressly noted that the lease agreements and employment contract between Villari and his sham cooperative, though reduced to writing, "were never signed by Villari nor did the Board of Directors ever insist upon execution" (61 F. Supp. at 787).

can explain why the Cooperative did not insist upon a bill of sale and why Mrs. Whitaker did not insist upon written evidence of the Cooperative's obligation to pay her for her business, if she was really parting with it.

Equally inexplicable, except on the basis that the Cooperative is nothing more than a cloak for Mrs. Whitaker, are the loose and informal arrangements by which she became general manager. Although uncertain as to how she became general manager (R. 45–46), Mrs. Whitaker was certain that she was to receive a weekly salary of $55 (R. 49). While salary at that rate has been accruing for her from the date the Cooperative started operations on July 18, 1957, no written agreement was ever prepared and no notation of the arrangement appears in the Cooperative's minutes until the twelfth meeting of the Board of Directors, held over a year later on the eve of the trial of this case, September 11, 1958 (R. 187–188).

Further evidence that the change to the cooperative form was not one of substance is the fact that Mrs. Whitaker has not drawn her salary, while members have been paid almost currently for their work. Since the by-laws require that wages and salaries be paid first (Art. 11, Sec. 1; R. 160), the inference is that the amount fixed as Mrs. Whitaker's "salary" was not intended as the measure of her compensation. Rather, it appears to be merely a device to limit the homeworkers' rewards to the fixed prices initially advanced to them. And beyond serving that purpose, the unpaid portion of Mrs. Whitaker's "salary," like the unpaid portion of the inventory "price," gives

Mrs. Whitaker effective control over the Cooperative by making her its largest creditor.

The by-laws, like the "salary" and "sale" arrangements, also appear to be largely window dressing, more honored in the breach than in the observance. Thus, no quorum was present at either of the two membership meetings (R. 122–123, 69, 73–74; Minutes of Meetings of October 26, 1957, and of June 26, 1958). Not only were those present unconcerned about the lack of a quorum, but they attempted to lift themselves by their bootstraps. At the June 26, 1958, meeting, they purported to amend the by-laws so as to reduce the number required for a quorum.[33] At the earlier meeting in October, Ella Banton was "'confirmed'' as treasurer (R. 173), to which office she had been appointed by the Board of Directors despite the by-laws' requirement that officers be elected by the members (R. 158).

The sparse attendance at the infrequent membership meetings corroborates the homeworkers' lack of control over the Cooperative. Forty-one out of 172 members attended the special meeting of October 26, 1957 (R. 123, 172). Only 37 out of the 195 members attended the other membership meeting on June 26, 1958, at which officers and directors were elected and

[33] The purported action seems to have been irregular on another score. While the by-laws provide that they may be amended by the vote of a majority of the members present at a special meeting called for such purpose or at a regular meeting, the notice of the special or regular meeting must set forth fully and clearly the proposed amendment (R. 74; 161). The minutes do not reflect that the notice of the June 1958 meeting did this.

other vital business was on the agenda (R. 74, 181–183). True, the many members who live in Tennessee and other distant states could hardly be expected to attend meetings. By the same token, however, the fact that so many nonresidents of Troy, Maine, and its environs have been admitted to membership confirms the conclusion that it was never intended that the body of homeworker-members would control the Cooperative. Obviously, "[s]uch 'members' cannot be said to exercise entrepreneurial skill, and they do not exercise, and * * * are unable to exercise, any control, effective or otherwise. To them Cooperative simply furnishes an opportunity to do homework, and to dispose of it, that is to say, get paid for it * * * differ[ing] in no respect from employees of any homework employer" (see the dissent below, R. 222–223).

In sum, here, as in *Palmer,* the evidence, considered as a whole, compels a finding that this Cooperative is not a bona-fide member-controlled organization—certainly not in any sense relevant to the coverage of this Act.

CONCLUSION

The decision and judgment below should be reversed with direction to enter the injunction prayed for in the complaint.

Respectfully submitted.

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FEBRUARY 1961.

APPENDIX

Statute and Regulations Involved

1. The pertinent provisions of the Fair Labor Standards Act of 1938, as amended (c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910; c. 867, 69 Stat. 711, 29 U.S.C. 201, *et seq.*) are as follows:

> Sec. 3. [52 Stat. 1061] As used in this Act—
>
> (a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.
>
> * * * * *
>
> (d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee * * *.
>
> "(e) "Employee" includes any individual employed by an employer.
>
> * * * * *
>
> (g) "Employ" includes to suffer or permit to work.
>
> * * * * *
>
> Sec. 6. [52 Stat. 1062; 63 Stat. 912; 69 Stat. 711] (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—
>
> (1) not less than $1 an hour;
>
> * * * * *
>
> Sec. 11. [52 Stat. 1066] * * * (c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages,

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hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

(d) [63 Stat. 916-917] The Administrator is authorized to make such regulations and orders regulating, restricting, or prohibiting industrial homework as are necessary or appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in this Act, and all existing regulations or orders of the Administrator relating to industrial homework are hereby continued in full force and effect.

* * * * *

SEC. 15 [52 Stat. 1068] (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

* * * * * *

(5) [63 Stat. 919] to violate any of the provisions of section 11(c) or any regulation or order made or continued in effect under the provisions of section 11(d), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

* * * * *

2. As currently codified, the pertinent parts of the Regulations adopted pursuant to the Fair Labor Standards Act of 1938 reads as follows (29 C.F.R. Part 530):

§ 503.1 Definitions.

(a) The meaning of the terms "person", "employ", "employer", "employee", "goods",

and "production", as used in this part, is the same as in the Fair Labor Standards Act of 1938, as amended.

(b) "Industrial homeworker" and "homeworker", as used in this part, mean any employee employed or suffered or permitted to perform industrial homework for an employer.

(c) "Industrial homework", as used in this part, means the production by any person in or about a home, apartment, tenement, or room in a residential establishment of goods for an employer who suffers or permits such production, regardless of the source (whether obtained from an employer or elsewhere) of the materials used by the homeworker in such production.

* * * * *

(f) The knitted outerwear industry is defined as follows: The knitting from any yarn or mixture of yarns and the further manufacturing, dyeing or other finishing of knitted garments, knitted garment sections, or knitted garment accessories for use as external apparel or covering which are partially or completely manufactured in the same establishment as that where the knitting process is performed; and the manufacture of bathing suits from any purchased fabric: *Provided,* That the manufacturing, dyeing or other finishing of the following shall not be included:

(1) Knitted fabric, as distinguished from garment sections or garments, for sale as such.

(2) Fulled suitings, coatings, topcoatings, and overcoatings.

(3) Garments or garment accessories made from purchased fabric, except bathing suits.

(4) Gloves or mittens.

(5) Hosiery.

(6) Knitted garments or garment accessories for use as underwear, sleeping wear, or negligees.

* * * * *

§ 530.2 Restriction of homework.

No work in the industries defined in § 530.1 (d) through (j) shall be done in or about a home, apartment, tenement, or room in a residential establishment unless a special homework certificate issued and in effect pursuant to this part has been obtained for each homeworker or unless the homeworker is so engaged under the supervision of a Sheltered Workshop, as defined in § 525.1 of this chapter.

§ 530.3 Application on official forms.

Certificates authorizing the employment of industrial homeworkers in the industries defined in § 530.1 may be issued on the following terms and conditions upon application therefor on forms provided by the Wage and Hour and Public Contracts Divisions. Such forms shall be signed by both the homeworker and the employer.

§ 530.4 Terms and conditions for the issuance of certificates.

(a) Upon application by the homeworker and the employer on forms provided by the Wage and Hour and Public Contracts Divisions, certificates may be issued to the applicant employer authorizing him to employ a particular worker in industrial homework in a particular industry, provided that the application is in proper form and sets forth facts showing that the worker:

(1) (i) Is unable to adjust to factory work because of age or physical or mental disability; or

(ii) Is unable to leave home because his presence is required to care for an invalid in the home; and

(2) (i) Was engaged in industrial homework in the particular industry for which the certificate is applied, as such industry is defined in § 530.1, prior to: (a) April 4, 1942, in the button and buckle manufacturing in-

dustry; (b) November 2, 1942, in the embroideries industry; (c) April 1, 1941, in the gloves and mittens industry; (d) October 7, 1942, in the handkerchief manufacturing industry; (e) July 1, 1941, in the jewelry manufacturing industry; (f) August 20, 1941, in the knitted outerwear industry; or (g) March 5, 1942, in the women's apparel industry (except that if this requirement shall result in unusual hardship to the individual homeworker it shall not be applied; or

(ii) Is engaged in industrial homework under the supervision of a State Vocational Rehabilitation Agency.

(b) No homeworker shall perform industrial homework for more than one employer in the same industry, but homework employment in one industry shall not be a bar to the issuance of certificates for other industries.

* * * * * *

§ 530.9 Records and reports.

The issuance of a certificate shall not relieve the employer of the duty of maintaining the records required in the regulations in Part 516 of this chapter and failure to keep such records shall be sufficient cause for the cancellation of certificates issued to such an employer.

3. When originally issued on March 30, 1942 [7 F.R. 2592], the Regulations restricting the employment of homeworkers in the Knitted Outerwear Industry were codified as 29 C.F.R. 617, and read, in pertinent part, as follows:

PART 617—MINIMUM WAGE RATE AND REGULATIONS APPLICABLE TO HOME WORKERS IN THE KNITTED OUTERWEAR INDUSTRY

* * * * * *

§ 617.3 *Restriction of home work.* No work in the Knitted Outerwear Industry, as defined herein, shall be done in or about a home,

apartment, tenement, or room in a residential establishment after November 30, 1942, except by such persons as have obtained special home-work certificates issued pursuant to applicable regulations of the Wage and Hour Division, authorizing industrial home work by any worker who was engaged in industrial home work in the Knitted Outerwear Industry prior to August 20, 1941, or is at any time engaged in such industrial home work under the supervision of a State Vocational Rehabilitation Agency or a Sheltered Workshop as defined in § 525.1 of this title, and who is unable to adjust to factory work because of age or physical or mental disability or is unable to leave home because his presence is required to care for an invalid in the home.

* * * * *

§ 617.101 *Definitions.* As used in these regulations, the term "industrial home work" means the production by any person in or about a home, apartment, tenement, or room in a residential establishment, for an employer, of goods from material furnished directly by or indirectly for such employer.

The term "knitted outerwear industry" as used herein means: The knitting from any yarn or mixture of yarns and the further manufacturing, dyeing or other finishing of knitted garments, knitted garment sections, or knitted garment accessories for use as external apparel or covering which are partially or completely manufactured in the same establishment as that where the knitting process is performed; and the manufacture of bathing suits from any purchased fabric * * *

* * * * *

4. The original Regulations, Part 617, were clarified on April 20, 1951, as follows [16 F.R. 3435]:

PART 617—KNITTED OUTERWEAR INDUSTRY, MINIMUM WAGE ORDER, HOME WORKERS

DEFINITION OF CERTAIN TERMS

The Administrator of the Wage and Hour and Public Contracts Divisions, pursuant to section 8 of the Fair Labor Standards Act of 1938, as amended, issued a minimum wage order for the Knitted Outerwear Industry, effective April 20, 1942. In conjunction with the issuance of this wage order the Administrator found that in order to carry out the purpose of the order and to prevent the circumvention or evasion thereof it was necessary to include in the order a provision restricting home work in the industry. To accomplish this restriction the Administrator issued regulations which provided that "no work" in the industry "shall be done in or about a home, apartment, tenement, or room in a residential establishment," except under special certificates to be issued only under specified conditions, and which, among other things, defined the term "industrial home work" as the "production by any person in or about a home, apartment, tenement, or room in a residential establishment for an employer of goods from materials furnished directly by or indirectly for such employer."

The Administrator is of the opinion that the regulations were intended to apply to all employment in home work whereby goods are produced for or on behalf of members of this industry, regardless of the source of the materials used by the homeworkers, and has been enforcing the regulations on the basis that homeworkers employed in this industry were subject to the act and the regulations whether they produced directly for an employer or distributor, or under a so-called "purchase and sale" or "agency" arrangement or other devices designed to disguise the employment rela-

tion. The fact that the regulations have been so construed and enforced has been well known to the members of the industry through the institution of court proceedings by the Administrator and the Secretary of Labor (Tobin v. Wagner, infra; Tobin v. Harwood, 10 W.H. Cases 73 (W.D. Tenn.); Tobin v. Van Wagemen-Sager, Inc. (N.D.N.Y. No. 3129)), and through court decisions upholding such construction (Tobin v. Harwood, 10 W.H. Cases 73 (W.D. Tenn.); Cf. Walling v. Wolff, 63 Fed. Supp. 605 (N.D.N.Y.))

Most of the members of this industry who formerly used or dealt with homeworkers have for years been under court injunction prohibiting the employment of homeworkers except in accordance with the statutory minimum and overtime requirements, and from using any "purchase and sales arrangements with any home workers" to avoid the requirements of the Act or the injunction "whether the materials are furnished by defendants or by others" (Jacobs v. Hand Knitcraft Institute, Civil 6–354 (S.D.N.Y.) 2 Wage and Hour Reporter 499, decree entered November 21, 1939).

The administrative authority to regulate or prohibit such home work clearly exists, particularly since the addition of section 11(d) to the Fair Labor Standards Act of 1938 by the Fair Labor Standards Amendments of 1949 (63 Stat. 910, 29 U.S.C. sec. 211(d). In a recent decision by the United States Court of Appeals for the Second Circuit in the case of Tobin v. Wagner Company, Inc., (March 21, 1951), the Court expressly recognized the administrative authority to regulate such home work, but questioned the intended scope of the present regulations on the ground that the language defining "industrial home work" is not sufficiently clear in the absence of "published rulings" giving notice of the administrative construction of such language as being applicable to situations

where the homeworkers obtain their materials from a source independent of the person for whom the goods are being produced.

* * * * *

Now, therefore, pursuant to authority vested in me by section 11(d) of the Fair Labor Standards Act of 1938, as amended, § 617.101 is amended to read as follows:

§ 617.101 *Definitions.* The meaning of the terms "person," "employ," "employer," "employee," "goods," and "production" as used in this part is the same as in the Fair Labor Standards Act of 1938, as amended.

"Industrial homeworker" and "homeworker," as used in this part, mean any employee employed or suffered or permitted to perform industrial home work for an employer.

"Industrial home work," as used in this part, means the production by any person in or about a home, apartment, tenement, or room in a residential establishment of goods for an employer who suffers or permits such production, regardless of the source (whether obtained from an employer or elsewhere) of the materials used by the homeworker in such production.

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